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No. OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term 1997

DARRELL V. MCGRAW, JR., Attorney General, State of West Virginia, Personally and in His Official Capacity,
Petitioner,

v.

BETTER GOVERNMENT BUREAU, INCORPORATED, an Ohio Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the appeal court's decision departs from the principles that are the foundation for the doctrine of qualified immunity when it essentially places a burden upon a public official to accurately determine that their acts were within their scope of their duties under the statutes, regulations and case law that define their duties and imposes a forfeiture of qualified immunity where that decision is erroneous even where the official's misapprehension or misjudgment as to the scope of his or her authority is negligently or innocently done.

2. Whether the appeal court's determination that the application of the doctrine of qualified immunity to a state public official's actions should require an inquiry into whether he or she exceeded the scope of their clearly defined authority is a misapplication of the standards established in Harlow v. Fitzgerald, 457 U.S. 800 (1982) and followed in Davis v. Scherer, 468 U.S. 183 (1984).

LIST OF PARTIES TO THE PROCEEDING

The following is a complete list of parties identified as plaintiff and defendant in district court and appellant and appellee in the court of appeals excluding the attorney-client issues.

Plaintiff/Appellee - Better Government Bureau, Inc. of Ohio, Roger P. Furey, Esquire, Michael B. , Esquire, E. Joseph Buffa, Esquire

Defendants/Appellant - Honorable Darrell McGraw Better Govenment Bureau of the State of West Virginia, A Body Politic, A Corporate Instumentality of Govenment with Limited Agency and Quasi-Sovereign Capacity; Ken Hechler, Secretary of State, in his Official Capacity
David P. Cleek, Esquire,
Marilyn T. McClure, Esquire.

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Attorney General Darrell V. McGraw, Jr., prays that a petition for certiorari issue to review the judgment and opinion of the United States of Appeals for the Fourth Circuit entered in this proceeding on July 16, 1997. References to the Appendix are designated as App. _

OPINIONS BELOW

The opinion of the Court of Appeals on rehearing denial is published at 119 F. 3d. 1129 (4th Cir. 1997) App. 91-116. The original panel opinion is published at 106 F.3d 582 (4th Cir. 1996) App. 1-55. The opinion of the District Court for the Southern District of West Virginia is published at 904 F. Supp. 540 (S.D. W.Va. 1995). App. 56-79. The District Court reinstated this opinion after vacating it and is published at 924 F.Supp. 724 (S.D. W.Va. 1996). App. 80-90.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 16, 1997. This petition is filed within 90 days of that date. The Court's jurisdiction is pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The judgment appealed from was an interlocutory appeal under §1291, Title 28, United States Code, from a denial of a summary judgment premised upon the ground that petitioner was immune from liability for damages based upon the doctrine of qualified immunity. Respondent filed claims under 42 U.S.C. §1983, 15 U.S.C. §1125, the First and Fourteenth Amendments to the United States Constitution and various state claims. The texts of these constitutional and statutory provisions are attached, in part, in App. 118-129.

STATEMENT OF THE CASE

This Court, recognizing the need to address the imposition on time, effort and governmental attention by unwarranted civil rights actions, determined in Harlow v Fitzgerald 457 U.S. 800 (1982) that as a means to resolve trials, the entitlement to qualified immunity should be resolved in a pretrial manner on objective factual grounds. In that case, this Court held that issue of whether qualified immunity from liability for damages existed turned on whether the defendant violated a clearly established right under a federal constitutional or statutory right which a reasonable person would have known.

In this case, a highly placed state official, the attorney general, has been sued for alleged violations of respondent's civil rights including the right of free speech, violations of trademark laws and violations of other common law and state constitutional provisions. This case involves the claims of the so-called Better Government Bureau, Inc. (BGB), an Ohio non-profit corporation, which asserts that it is a watchdog association for business and conservative interests.

The BGB of Ohio is largely controlled and was founded by an Ohio corporation, Suarez Corporation Industries (SCI), which operates sweepstakes subsidiaries which have been banned from doing business in West Virginia as a result of Attorney General McGraw's injunction suits for fraudulent activities.

The Better Government Bureau, Inc. of Ohio (BGB) was incorporated in Ohio in 1993 and was incorporated in the State of Washington in 1994. The BGB claims to be a national watchdog group for business interests but the overwhelming majority of its members are from Ohio. Many of its members are employees of SCI which provides approximately 90% of the funding for respondent's activities. These activities in West Virginia and Washington have included the filing of freedom of information suits for budgetary and other information from attorney general's offices in disputes with SCI's sweepstakes companies, investigations by private investigators and others of public officials, setting up picket lines with demonstrators carrying signs condemning a West Virginia Deputy Attorney General as a draft dodger, radio and newspaper advertisements critical of various attorney generals, including petitioner and others, who have investigated SCI's business activities and the dissemination of newsletters or articles critical of state officials. Some of BGB's articles critical of the actions of West Virginia's Attorney General were published in magazines owned by Suarez Corporation Industries (SCI). Such tactics are commonly used by the BGB. Officials of SCI are members of the board of trustees of the Better Government Bureau, Inc., the respondent here. SCI is reimbursing the BGB for its attorney's fees expended in this litigation.

After a lawsuit was filed in West Virginia courts against an SCI subsidiary and others which conducted sweepstakes activities in this state, the BGB began its activities in West Virginia. The BGB made an announcement on radio stations in West Virginia that stated:

" THIS IS AN IMPORTANT
ANNOUNCEMENT

The Better Government Bureau is investigating the actions of Attorney's (sic) General Darrell McGraw and [Assistant Attorney General] Tom Rodd.

Voters already removed McGraw from the State Supreme Court because of his poor performance.

Now we are trying to obtain public information about the Attorney General under the 'Freedom of Information Act', but it has been denied. What are McGraw and Rodd trying to hide?

If you have any information about Darrell McGraw, Tom Rodd or anyone in the Attorney General's Office, please contact the Better Government Bureau toll free at 1-800-807-9881. The number again is 1-800-807-9881.

PAID FOR BY THE
BETTER GOVERNMENT BUREAU."

The BGB also claimed it was intending to open a West Virginia office and possibly start a chapter to "crack politics in West Virginia." App. 58.

The BGB had not incorporated in West Virginia nor had it reserved the name "Better Government Bureau" by appropriate filings in the Secretary of State's office when it began its activities. Shortly after this publicity began, Attorney General McGraw had an employee of his office file documents with the Secretary of State to reserve this name. Later that same day McGraw and his employee completed the appropriate documents to incorporate a quasi-sovereign corporate agency known as the Better Government Bureau, State of West Virginia, a Government Agency Corporation. McGraw used personal funds to pay the filing fees to do so. This agency has gone through several name changes, has obtained a telephone listing and letterhead. An application for non-profit status has been undertaken and other actions have been taken although this state corporate agency has not been functioning to any extent during this litigation.

Attorney General McGraw claimed that the formation of this quasi-sovereign corporate agency was intended to conduct activities and establish programs for consumer education and related tasks which his office had authority to do under the provision of Chapter 46A, Article 7, Section 102 of the West Virginia Code which is part of the consumer protection laws in this State. The proposal for these activities included using the corporate state agency's non-profit status to raise money for such activities similar to the manner in which other agencies in this state solicit private funds for public purposes such as public radio.

About a month after Attorney General McGraw's actions, the respondent, Better Government Bureau, Inc., attempted to incorporate as a foreign corporation doing business in West Virginia. The Secretary of State rejected this effort as the name had already been used by the attorney general in incorporating the state corporate agency as an

instrumentality of the Attorney General's Office. Efforts to get this matter resolved were unsuccessful. In the meantime. Attorney General McGraw sent letters referring to respondent to 49 other attorneys general stating as follows:

> "If your office becomes involved in a sweepstakes probe, you will encounter this corporation. To foreclose the possibility of such a corporation operating in your State, you may want to register the name of the Better Government Bureau as a agent for the Attorney General's Office with the Secretary of State's Office or take other preventative measures.
>
> App. 61

In October, 1994, the BGB of Ohio filed this suit against Attorney General McGraw and Secretary of State Ken Hechler alleging that: (1) These defendants violated BGB's free speech rights and; (2) These defendants violated the Lanham Act and the common law by acts of trademark and service mark infringement. The suit requested injunctive relief and money damages. As to the constitutional claims under 42 U.S.C. §1983, the BGB sought damages only against Attorney General McGraw.

The parties filed cross motions for summary judgment and the district court granted summary judgment to Secretary of State Hechler, the West Virginia BGB and Attorney General McGraw on the state claims based upon the Eleventh Amendment immunity defense. The district court denied all other motions including Attorney General McGraw's motion for summary judgment on the defense of qualified immunity to BGB's federal claims. See App. 56-79. Attorney General McGraw appealed that ruling to the court of appeals. During the pendency of that appeal, a

secretary in the Attorney General's Office, who had surreptitiously taken a memorandum from that office, turned it over to BGB's lawyers in a secret meeting. This memorandum had not been previously provided in discovery and its existence was unknown to defense counsel.

The document directed to the Secretary of State from an assistant in the Attorney General's Office surreptitiously taken by that secretary stated:

> "The Attorney General's Office anticipates that an organization called the Better Government Bureau, out of Canton, Ohio, will shortly seek registration through your office, in order to conduct its alleged business in the State of West Virginia. When the Better Government Bureau attempts registration the Attorney General requests your office to resist and refuse such registration on the grounds that the Better Government Bureau's attempt to ply its business in our state constitutes a fraud and a deceit.
>
> Also, please inform me when the organization's application is received by your office. Thank you for your attention to this matter."
>
> App. 83..

Later, another document was discovered in the office of the Secretary of State which had not been previously disclosed in discovery. That document from the Secretary of State to an assistant in the Attorney General's Office read:

"In response to your memorandum of September 26, and after personal discussion with the Attorney General, I will be pleased to inform you when the Better Government Bureau actually attempts to register with the Secretary of State's office. The issue of resisting and refusing such registration is more complicated than I at first imagined.

I do not recall any instance when any organization has been denied registration because of its political activity. Your memorandum refers to the BGB's 'attempt to ply its business in our state as constitut[ing] a fraud and a deceit'. Without passing judgment as to whether this would constitute sufficient grounds for resisting and refusing registration. I would ask that you spell out in writing the fraud and deceit to which you refer in your September 26 memorandum.' App. 85.

This matter was remanded from the court of appeals to the district court, by stipulation, where discovery was reopened. The respondent alleged that these documents had been deliberately withheld. After additional discovery and an internal investigation, the district court reinstated its earlier order denying qualified immunity to Attorney General McGraw on the grounds that Attorney General McGraw should have known that his acts violated the First Amendment rights of BGB and that his acts were beyond the realm of his discretionary duties and were outside the scope of his authority. See App. 80-90.

The panel of the court of appeals which heard this case chose not to address the clearly established rights issue in its opinion and instead focused on the scope of authority

issue which it characterized as a matter of first impression in this circuit. The court of appeals undertook an analysis of West Virginia law to determine whether a reasonable official would have understood that forming a quasi-sovereign corporate agency "was an act clearly established to be beyond the limits of his authority" App. 1-55. The court of appeals held that when a government official acts beyond the scope of his authority, he or she received no immunity at common law and was entitled to none under § 1983. App. 20-22. After examining state law and state court decisions, the court of appeals held that there was a lack of statutory or constitutional authority for Attorney General McGraw's action and that his acts were beyond his authority. Thus, he could not claim qualified immunity. App. 91-116.

A petition for rehearing and a suggestion for a rehearing en banc was filed and denied. See App. 91-116. The vote to deny rehearing was 6 to 6 with one judge abstaining and the concurring and dissenting opinion were sharply divided. It is from that opinion, this petition for certiorari is filed.

REASONS FOR ALLOWANCE OF WRIT

This case warrants review by this Court to resolve apparent conflicting rulings among the courts and to settle the federal question decided by the court of appeals in a manner that departs and conflicts from relevant decisions of this Court. The issues presented revolve around whether the court of appeals' holding that allows a qualified immunity defense to be forfeited where there is a finding that a defendant violated a clearly established right, including one under state law, by exceeding the scope of his or her authority is consistent with Davis v Scherer, 468 U.S. 183 (1984) and other cases. A review by this Court is required to address the incompatibility of this holding with the purposes

and design of the defense of qualified immunity for public officials performing discretionary acts.

1. The decision below departs from the principles that are the foundation of the qualified immunity doctrine in that it requires a public official to accurately determine their acts are within the scope of their authority, which is not a proper element of the qualified immunity analysis.

The opinion from the court of appeals is nothing short of a departure from the framework established by this Court to effectuate the qualified immunity determination as established in Harlow v Fitzgerald, 457 U.S. 800 (1982). It stands this Court's ruling in Davis v Scherer, 468 U.S. 183 (1984), on its head and allows the forfeiture of a qualified immunity defense if it is determined that a state official acted outside the scope of his or her state law authority. The court of appeals' ruling makes state law always relevant and perhaps determinative of the official's right to qualified immunity. This ruling allows a state official to lose qualified immunity for the failure to act within the scope of a state law or for a violation of state law. This forfeiture of qualified immunity would apparently be lost even if the official's misapprehension or misjudgment of the law caused the action to be taken.

It is difficult to formulate a more articulate and forceful argument for review of the court of appeals' ruling than the dissenting opinion written by Circuit Judge Luttig of the Fourth Circuit Court of Appeals and joined in by five other judges. In the text of the dissenting opinion, it is stated that:

"In erecting this new framework within which state law is *always* relevant and often *dispositive* of a defendant's federal right to qualified immunity, the panel quite obviously misunderstands both section 1983 and the immunity defense of Harlow. Section 1983 provides a federal cause of action against persons acting under color of state law for conduct that violates federal rights. Under Harlow, official immunity is available as against this federal cause of action if the defendant official did not violate clearly established federal, constitutional or statutory rights. Nothing else is required for entitlement to the defense and nothing else need be shown. Whether a defendant violated state law, whether he clearly violated state law, or whether he acted outside of state law, is never determinative of this federal immunity defense, because an official may lose his immunity only if he violates the statutory or other rights which give rise to the cause of action sued upon. Because the rights give rise to the section 1983 cause of action are solely federal rights - namely, the federal Constitution and federal statutes - it follows that an official can never lose his immunity through the violation of state law (even clear state law), or even through the failure to act within that law. He forfeits his official immunity *only* through the violation of clearly established federal law, as Harlow held. State law may on occasion provide *the basis* for the right that gives rise to cause of

> action under section 1983, such as where it creates a property right protected under the due process clause, but state law does not, and can never, provide the right that gives rise to the cause of action under section 1983." App. 106-107.
>
> This language sets out the primary issue that should be reviewed here.

This ruling by the court of appeals now requires a state official, as part of the burden of demonstrating that he or she did not violate the clearly established federal constitutional or statutory rights, to show that they did not exceed the scope of their state authority. Thus, the district court must not only consider the Harlow inquiry of whether the defendant violated a clearly established right, constitutional or statutory, of which a reasonable official would have known but must also decide whether an official acted outside the scope of their state law authority. State officials, who assert a qualified immunity defense, will have to show all the state statutes, regulations and court authority to support the proposition that their actions were duties within the scope of their state law authority which the dissent observed are "...duties which often will not be defined with anything approaching the specificity with which federal duties are defined." App. 109-111. The district courts will then have to analyze state law issues involving the "intricacies of state statutes, regulations and case law" to determine the qualified immunity claim. *Id.* The dissenting opinion expressed grave concerns over the "profound consequences for the principles of federalism" that such an approach would create. App. 113-115.

It would appear that this Court had similar fears when it considered the issues in Davis. In the Davis case, it was the appellee's assertion that an official's violation of a state

statute or regulation was objectively unreasonable and should deprive an official of qualified immunity. This position was proposed to be limited by a requirement that the plaintiff be compelled to allege the violation of a statute or regulation in their claim that was designed to protect constitutional rights or advance important interests. This Court stated that once the door was opened, it would be difficult to limit the scope of such inquiries and district courts would be granted considerable discretion to extract from statutes or codes the provisions the judges felt were important enough to deny qualified immunity. This approach would have required extensive inquiry and protracted litigation. Further, stated this Court, such approach would require inquiry into whether the official appreciated the applicability and importance of the rule. This approach would make it difficult for officials to appreciate the legal effects of their acts. Such an approach would require an official to know the rule and the intent with which it was adopted which this Court found to be unfair and impractical.

This Court in Davis stated that while the proposition that state statutes and regulations should be relevant to a claim of qualified immunity was "appealing", it had to choose between two evils involving the vindication of constitutional rights and the effective conduct of state official's duties. This Court recognized that state officials are subject to a "plethora of rules" often contradictory and ambiguous and that an official should not always err by being cautious as at times swift action is needed to effectively perform official duties. The approach that an official could be held liable for violation of a statute or regulation was not acceptable as it could subject officials to liability where the right was not clearly defined or even foreshadowed. Further, Davis pointed out that the issue of qualified immunity could then turn on the meaning or purpose of a statute which the district court might not be able

to address on summary judgment. The concerns of this Court in Davis are now the troubling realities in this case.

In this case, the court of appeals held that the Attorney General clearly exceeded his authority to establish a program to educate consumers by establishing a corporate state agency to perform this task under West Virginia Code 46A-7-102. App. 24-28. The court of appeals also rejected Attorney General McGraw's claim that his authority to perform these acts existed under the state constitution which directed him to "faithfully discharge the duties of his office to the best of his skill and judgment" and "perform such duties as prescribed by law", as set forth in Article IV, §5 and Article VII, §1 of the West Virginia Constitution and that his acts ignored applicable case law limiting the Attorney General's powers. App. 26-28. The panel opinion found that the Attorney General's power had been limited in Manchin v Browning, 296 S.E.2d 909 (W.Va. 1982) and other cases. Attorney General McGraw had authored the Manchin case as a justice on the state supreme court of appeals.

The court of appeals stated in footnote 5 of its concurring opinion that the fact that Attorney General McGraw had created an entity heretofore unknown in West Virginia, and used his own funds, showed that"...he wondered far beyond the limits of his authority." App. 26-28. The dissenting opinion on the petition for rehearing en banc found that this substitution of judgment that the acts clearly exceeded McGraw's powers was based on a distinction nowhere in any statute, regulation or court decision in West Virginia and was "...nothing but the rawest exercise of federal power." App. 111-113. In effect, the court of appeals interpreted the scope of petitioner's authority in a manner never before addressed by state law or court decision on this issue.

It must be pointed out that the district court addressed this scope of authority issue in a footnote. The court of appeals decided this case based on this issue. The dissenting opinion stated:

> "And, as if to add insult to injury, this new framework is created and imposed in a case in which the issue was not even presented, the district court having treated the issues only conclusiorily, See Better Government Bureau, Inc. v McGraw, 904 F.Supp. 540, 553 n.17 (S.D.W.Va. 1995). The panel thus addresses with a thirty page opinion an issue mentioned passingly by the district court in only a footnote, and consigns to a footnote the district court's principal holding that there existed a factual dispute as to whether McGraw acted with the requisite retaliatory motive to violate the plaintiff's clearly established First Amendment right..."
>
> App. 106.

The concerns expressed by these words are evident.

Interestingly, although the court of appeals declined to follow McElveen v County of Prince William, 725 F.2d 954 (4th Cir. 1984) which utilized subjective factors to analyze qualified immunity entitlement which case was decided after Harlow and has never been reversed, it has effectively left in place a denial of qualified immunity by the district court which found that a factual dispute existed as to whether Attorney General McGraw acted with a retaliatory motive. Such a determination on motivation undoubtedly would involve the consideration of subjective issues. Admittedly, even though an official's subjective intent may

be irrelevant to the immunity question under Harlow, it still may be an essential element of the alleged constitutional violation. However, if Attorney General McGraw's acts were lawful then his motivation is of no moment. In Elder v Holloway, 510 U.S. 516 (1994), this Court held that whether a federal right was clearly established so no qualified immunity exists is a question of law not legal facts. This determination makes this ruling even more confusing. The fact that the opinion of the court of appeals also addressed Attorney General McGraw's knowledge of the scope of the attorney general's authority as he had written opinions as a state supreme court justice seems to inject a subjective view into what the court claimed was an objective interpretation. App. 27-28. There may be some apparent merit to such analysis as to what a reasonably competent official as attorney general might understand about rights or duties since an attorney general is law trained, but even astute lawyers may disagree as to the meaning of intricate state laws.

As this Court stated in Harlow, supra, if the law was not clearly established, an official cannot be expected to anticipate future developments of the law "...nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful..." 457 U.S. at 818. This Court further pointed out that a reasonable official should know the law governing his or her acts but if an official could show extraordinary circumstances so that he or she neither knew or should have known the legal standard then qualified immunity could be sustained although the defense would turn "primarily on objective factors" 457 U.S. at 819. Although this Court in Anderson v Creighton, 483 U.S. 635 641 (1987) held that the officer's subjective beliefs about a warrantless search were irrelevant, it held that the question was whether a reasonable officer could believe the search was lawful in "...light of clearly established law and the information the searching officers possessed". A public

official cannot be required to predict a future court interpretation of some law.

> 2. The decision below misapplies the standards for the determination of qualified immunity cases established in the case of Harlow v Fitzgerald 457 U.S. 800 (1982) and Davis v Scherer, 468 U.S. 183 (1984).

The pivotal point of this case turns on the holding in Davis v Scherer, supra. This Court in Davis held that a state official does not lose qualified immunity even by violating a state regulation. This Court observed in Davis that the proposition that a clear state law violation by an official should cause the loss of immunity was appealing but such a view, if adopted, would disrupt the balance between the preservation of constitutional rights and the official's meaningful performance of duties. The district Court in Davis had taken the view that the violation of a clearly established state regulation was per se unreasonable. In the appellee's view, any official conduct that violated a state statute was not objectively reasonable as an official was obligated to follow the law. This Court held in Davis that officials do not forfeit immunity by violating a statute or regulation unless there is a clear violation of a statutory right that gives rise to the cause of action. If a statute or regulation does give rise to the cause of action, then immunity is waived only to a limited extent. There is no claim here that some state statute itself created a cause of action. Under Davis, the violation of a state statute or regulation, not the basis of the suit, does not deprive the official of qualified immunity.

The dissenting opinion addressed this issue as follows:

> "Rather than acquiesce in today's unsupported and insupportable reformulation of Harlow's qualified immunity inquiry, I would grant the petition for rehearing en banc and dispose of the appellee's argument, that a public official loses his entitlement to federal qualified immunity if he exceeds the scope of his state law authority, in precisely the same way the Supreme Court disposed of the doctrinally indistinguishable claim that federal qualified immunity is lost if an official violated clearly established state law. I would acknowledge that '[o]n its face...the claim is not without some force,' but I would 'decline to adopt it,' Davis, 468 U.S. 194, because of its fundamental incompatibility with established qualified immunity doctrine and because of the unfathomable consequences that its acceptance would (and now will) have for a framework carefully designed by the Supreme Court to result in the expeditious resolution of suits against public officials for the reasonable exercise of their discretionary judgments."
>
> App. A at 116.

The issue in Davis was a limited and discrete one. The question was whether qualified immunity was defeated where the defendant violated any clearly established law, even one under state law, or whether the clearly established right must be a federal right. This Court held the latter. See also Elder v Holloway, supra. The dissenting opinion on the petition for rehearing en banc observed that while state law may occasionally provide a ground for the right that gives

issue to a § 1983 claim, such as where state law created a property right, "...state law does not, and can never, provide the right that gives rise to the cause of action under § 1983" App. 107. The dissenting opinion further stated that whether a state official violated state law or acted outside the scope of the state law is never determinative of the immunity defense. *Id.* In Clark v Link, 855 F.2d 156, 161 (4th Cir. 1988), Judge Russell wrote that "A fundamental and fatal flaw on the decision of the district court ...is its assumption that a §1983 claim may be based alone on a violation of state law or a state tort."

The Clark case undertook a thorough review of this issue. It pointed out that in Street v Surdyka, 492 F.2d 368 (4th Cir. 1974), the court had held that even if the police officer had violated the state arrest law, he was not liable under § 1983 unless he also violated federal constitutional law regarding arrests. See also Fisher v Washington Metro Area Transit Authority, 610 F.2d 1133 (4th Cir. 1982). The Clark case also pointed out that Chief Justice Rehnquist had stated in a Florida case "...that mere errors of state law are not the concern of this Court...unless they arise for some reason to the level of a denial of rights protected by the United States Constitution" Barclay v Florida, 463 U.S. 939, 957-958 (1983). The Clark v Link case also cited Davis v Scherer, supra, to support this view that a violation of state law does not generally foreclose a qualified immunity defense. The panel opinion of the court of appeals did not address the holding in the Davis case.

Interestingly, the concurring opinion relied upon Wyatt v Cole, 504 U.S. 158 (1992), to support its position. In Wyatt, this Court held that private defendant could not claim qualified immunity for alleged violations of § 1983. The concurring opinion observed that the Wyatt case never mentioned Davis. The dissenting opinion points out that Wyatt was never mentioned in the original panel opinion and states "[]t would of course be difficult to imagine a case less

like the case before us than Wyatt" App. 113. The sharpness of these disagreements in both the concurring and dissenting opinions on the denial of the petition for rehearing as to the proper means of analyzing qualified immunity matters justifies a review here.

The court of appeals in its opinion held that its ruling does not require a state official to be responsible for knowledge of an arcane rule but all that the official must know is the limit of his or her authority. App. 18-20. The court of appeals stated that its ruling jeopardized no public policy goal by requiring a government official to know the limits of his authority and holding him or her responsible for actions clearly outside these limits. *Id.* The court of appeals stated in its concurring opinion that when a state official acts totally beyond his or her authority, they receive no immunity at common law nor under § 1983. App. 20. That opinion emphasized that at the common law, an official's immunity was limited to acts within the scope of his authority which it claims this Court had followed in a long line of cases. In fact, this Court in Butz v Economou, 438 U.S. 478 (1977), observed that earlier immunity cases had not abolished liability for federal officers who had acted manifestly beyond their line of duty or beyond their statutory limits or acted knowingly to violate rights. Section 1983 omits the immunities on its face but this Court has identified numerous immunities applicable in such cases. Tower v Glover, 467 U.S. 914 (1984).

The concurring opinion seems to rely on absolute immunity cases in making the conclusion that scope of authority was a relevant issue in a qualified immunity analysis. It also cited the recent case of Clinton v Jones, 117 S.Ct. 1636, 137 L. Ed.2d 945 (1997) for this proposition which case addressed absolute presidential immunity and barred it for unofficial conduct while noting that the sphere of the official action must be related to the immunity's purpose. We do not believe that the Clinton case extends so

far as the court of appeals has extended it. The dissenting opinion pointed out that although the concurring opinion for the first time placed reliance on Wyatt, the point was misplaced as to the common law analogy and pointed out that as to absolute immunity, common law historical practice should be followed but qualified immunity had diverged "to a substantial degree from the historical standards" Wyatt, 504 U.S. at 170. App.111-112. The concurring opinion makes a distinction between a claim to qualified immunity and an entitlement which may be defeated to distinguish Davis. App. 113-116. The dissent finds that distinction unexplained and nonexistent. *Id.*

Essentially, under this ruling a state official may forfeit his or her qualified immunity if they innocently or negligently misapprehend, misinterpret or misjudge their scope of authority under state law. Although a West Virginia case refers to scope of authority in addressing state tort claims for which qualified immunity was claimed, we do not believe such an analysis is appropriate for § 1983 claims although an analogy to such cases was drawn in that case. State v Chase Securities, 424 S.E.2d 591 (W.Va. 1992). It appears that the confusion as to the holding in Davis continued in that case as the court in footnote 17 noted that violations of administrative rules may be included as rights under Davis which seems to be plain wrong. West Virginia has extended discretionary immunity even to negligence claims involving state officers. Clark v Dunn, 465 S.E.2d 374 (W.Va. 1995).

Thus, a claim under § 1983 could be premised upon a negligent interpretation of the scope of authority under state law which would appear to violate the holding in Daniels v Williams, 474 U.S. 327 (1986). Effectively, the court of appeals' decision could place an official in a position where he or she may forfeit immunity if they cannot anticipate that a federal court would forbid their conduct which conduct had not been previously identified as beyond their authority. The

chilling effect of this guessing game is what Harlow meant to preclude. There should be no liability for a mistake in judgment whether law or fact. In Hunter v Bryant, 502 U.S. 224 (1991), this Court held that the information held by federal agents established a reasonable belief that probable cause for arrest existed and qualified immunity should be provided even if their belief was mistaken. This Court pointed out that the qualified immunity standard permits mistakes and reasonable errors. The central purpose of immunity is to protect officials from interference with their duties and the chilling threat of liability. The doctrine of qualified immunity is an immunity from suit rather than a defense to liability and it is lost if a case is erroneously tried. Mitchell v Forsythe, 472 U.S. 511 (1945).

The petitioner argued below, that if this approach was to be taken, whether an action was clearly established as beyond the scope of an official's authority should depend upon an examination of case law and where no contrary case law existed, then the state official must be held to have acted within the scope of their authority. The court of appeals found this argument in footnote 4 of its opinion to be faulty and observed that statutes and regulations must also be examined. That holding is erroneous even if this approach was reasonable.

In Francis v Coughlin, 891 F.2d 43 (2d Cir. 1989), the court set out three factors to determine if a right was clearly established including whether under pre-existing law an official would understand his or her acts were unlawful. In West Virginia a judge has immunity for acts within his jurisdiction but outside his authority. Carey v Dostert 406 S.E.2d 678 (W.Va. 1992). As the dissenting opinion pointed out, there was nowhere in any statute, regulation or court opinion support for the distinction relied upon by the court of appeals in finding the Attorney General clearly exceeded his authority App. 111. Effectively, under the approach in this case, a misjudgment by an official as to his scope of

authority would forfeit immunity. Such a result was not contemplated by Harlow or Davis.

In Horta v Sullivan, 4 F.3d 2 (1st Cir. 1993), the court held that the plaintiff must demonstrate that, at the time at issue, in light of the pre-existing law, the unlawfulness of the action would have been apparent to the official to challenge a qualified immunity claim. This view was followed by the 11th Circuit in Lassiter v Alabama A&M University Board of Trustees, 28 F.3d 1146 (11th Cir. 1994), which held that for the law to be clearly established it must have been developed in a concrete and defined manner to make it obvious to the official that what he was doing violated federal law. The plaintiff has to demonstrate that the law is clearly established which means that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right." Anderson v Creighton, 483 U.S. 675, 640. (1987). That rule has been exceeded by the approach of the court of appeals here.

The plain language of § 1983 supports causes of action based on violations, under color of state law, of federal statutory or constitutional rights as interpreted by this Court in Maine v Thiboutot, 448 U.S. 1 (1980). A state statute does not provide a federal cause of action for state law violations. Philadelphia Police and Fire Association for Handicapped Children Inc. v City of Philadelphia, 874 F.2d 156 (3d Cir. 1989). In view of this case law, it seems the court of appeals went too far in imposing a new framework for analysis of qualified immunity claims. Such an approach is not only not required under Harlow, supra but would create difficult if not intolerable burdens on state officials and the federal courts considering qualified immunity claims.

The court of appeals held that only if a state official acted plainly outside the perimeter of his duties under state law does he or she lose immunity. The court of appeals cites three circuit court cases to support this proposition, namely

Schechter v Comptroller of New York, 79 F.3d 264 (2d Cir. 1996); Lenz v Winburn, 51 F.3d 1540 (11th Cir. 1995) and Merritt v Mackey, 827 F.2d 1368 (9th Cir. 1987). These cases cannot be used to expand the factors used to analyze the application of qualified immunity. While it is true that the Eleventh Circuit uses a two step analysis for determination of qualified immunity issues, Harlow does not support that approach. The Lenz case involved a guardian ad litem who for compassionate reasons seemed to act in a private capacity rather than in an officer of the court capacity. That decision is distinguishable here.

The Schechter case seems to turn on the concept that no immunity exists for unofficial acts. The court there was concerned with an approach that tested the legality of the official act as the determining factor on the scope of authority question. The court recognized that to examine such an issue in that manner could effectively eliminate the qualified immunity defense as any wrongful conduct would be beyond the scope of authority. That was precisely the concern in Davis. In the Merritt case, state law had created a property interest in continued employment for an employee of a corporation receiving federal funding. Further, it was determined that the officials knew they had no authority to act and knowingly acted outside their authority. We believe these cases, even though distinguishable otherwise, still propound a two step approach to a qualified immunity analysis that defies Davis. We believe that Davis makes it clear that no circumstance other than the objective reasonableness of an official's act measured by reference to clearly established law should be considered in addressing the issue of qualified immunity.

The approach in Schechter, Lenz and Merritt which utilizes a two prong test which includes an analysis of scope of authority has apparently caused confusion and contradictory opinions in the courts of those circuits. In A.M. v Grant, 889 F. Supp. 1495 (M.D. Ala. 1995), the court

used a two prong analysis to address a qualified immunity claim which first required the public official to prove he was performing duties within his discretionary authority, which could involve facts showing acts were part of normal job duties or within authority give by his or her employer, and secondly that the constitutional law was clearly established and the government official's conduct presented a genuine issue of fact that they engaged in acts violative of clearly established law. In Pisello v Town of Brookhaven, 933 F. Supp. 202 (E.D. N.Y. 1996), the court held that qualified immunity existed if the conduct does not violate clearly established constitutional and statutory rights but even if the right is clearly established, an entitlement to qualified immunity may exist where it was objectively reasonable for the official to believe his acts did not violate the clearly established right.

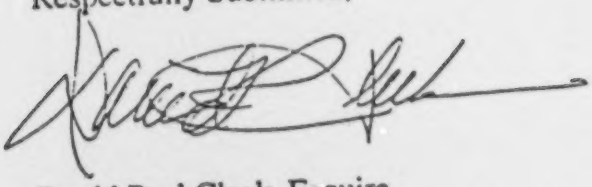
In Zappala v Albicelli, 954 F. Supp. 538 (N.D. N.Y. 1997), the district court held that the qualified immunity doctrine analysis required a two prong test. It stated that these two prongs were whether the right claimed to be violated was clearly established and whether the official's conduct was still objectively reasonable under the circumstances. The district court cited Schechter in this opinion and observed that the Second Circuit had suggested that the clearly established prong could be determined by examining three factors. Those factors were: (1) whether the right was defined with reasonable specificity so that the official would have truly been on notice of the relationship between his conduct and applicable law; (2) whether the law of this Court and the Second Circuit supported the existence of the right and; (3) whether the state of the law at the time of alleged violation would have given a reasonable official an understanding that his or her acts were unlawful. It should be noted that the court of appeals in the concurring opinion here asserted this scope of authority issue was a matter of first impression in this circuit.

The district court in Wise v The New York City Police Department, 928 F. Supp. 355 (S.D. N.Y. 1996), held that there was a three prong test for analyzing whether a right was clearly established and followed Schechter as had Zappala. The only question to be decided there was whether a reasonable official would have believed their acts were unlawful under pre-existing law. The district court quoting Malley v Briggs, 475 U.S. 335 (1986), stated that an official can comply with the objective reasonableness test if it is shown that "'officers of reasonable competence could disagree' on the legality of defendant's actions" 928 F. Supp. at 368. In this case, the court of appeals in the dissenting opinion observed that the panel decision substituted its judgment for the attorney general who had formerly served on the Supreme Court of Appeals in West Virginia. App. 111-112. It seems to depend on which side of the issue the drafter of the opinion stands as to whether that prior service is a detriment or a compliment. This case presents an opportunity to reconcile the immunity cases and to set forth a firm and unequivocal standard for the federal courts to use which effectively promotes the balancing of interests required to make the doctrine of qualified immunity an effective tool in the determination of § 1983 cases.

CONCLUSION

For these various reasons, a petition for certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals in this proceeding.

Respectfully Submitted,



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